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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1748

CLIFFORD LAVERN BISHOP, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2) is reported at 492 F.2d 1361. Two opinions of the district court (Pet. App. 1), filed on January 9 and February 28, 1973, are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1974. A petition for rehearing was denied on April 22, 1974. The petition for a writ of certiorari was filed on May 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced when an exhibit not admitted into evidence was delivered to the jury.

2. Whether allegedly prejudicial remarks and testimony denied petitioners a fair trial.

3. Whether the evidence was sufficient to show that prostitution was one of the objectives of the charged conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952, prohibiting interstate travel to establish an unlawful business involving gambling, prostitution and bribery, in violation of 18 U.S.C. 371. They were each sentenced to a term of five years' imprisonment and committed for a study pursuant to the provisions of 18 U.S.C. 4208(b). Petitioners' motions for new trials were denied (Pet. App. 1), and the court of appeals affirmed (Pet. App. 2; 492 F. 2d 1361).

The government's evidence showed that on May 12, 1971, Jess Roberts met with petitioner Grayson, then an Oklahoma District Attorney, to discuss Roberts' plan to erect a private club in Grove, Oklahoma, within Grayson's jurisdiction (Tr. 8-11).[1] Petitioner Gray-

[1] "Tr." refers to the four-volume transcript of the trial, a copy of which is being lodged with the clerk of this Court. Volume I is paginated 1a-143a. Volume II (headed "Partial

son advised Roberts on the operation of the club and stated that liquor and beer could be served (Tr. 10-11). Roberts' Mr. Yuk Club opened on August 26, 1971 (Tr. 15). After raids by local law enforcement officers on September 2, September 17, November 6, and November 19, 1971, he was charged with operating an open saloon (Tr. 21-22).[2]

Petitioner Bishop was introduced to Roberts on December 5, 1971 (Tr. 27-29). In mid-December, Bishop telephoned Roberts from Kansas City and suggested that he might be able to alleviate Roberts' problems with the raids through political connections (Tr. 30). Bishop also suggested that he had an idea to make money, and that he might join Roberts in a new business venture (Tr. 31). Roberts flew to Kansas City on December 22 and discussed with Bishop the possibility of establishing a vending machine business (Tr. 36-37). They were joined by petitioners Duardi and Brancato, and the four discussed the raids on the Mr. Yuk Club (Tr. 37-38). At Duardi's request, Roberts named the law enforcement officials involved, including petitioner Grayson (Tr. 38). Petitioners Duardi and Brancato suggested that they might be able to eliminate some of the raids (Tr. 38-39).

Transcript of Proceedings") is paginated 1-412; Volume III, 413-700; and Volume IV, 701-914. There is also a transcript of proceedings examining the jury panel, also headed "Partial Transcript of Proceedings" and paginated 1-38. This document will be referred to as "P. Tr." and is also being lodged, along with an index to the transcripts.

[2] Sale of liquor by the drink is prohibited in Oklahoma. Oklahoma Constitution, Article 27, section 4.

On January 7, 1972, the Mr. Yuk Club was again raided, charges were filed against Roberts, and all the furniture in the club was seized (Tr. 41). Roberts later discussed the raid with petitioner Grayson, who requested the meeting (Tr. 41-42). Grayson apologized for the raid, explaining that it was undertaken for political reasons (Tr. 42-43).

Petitioner Bishop visited Grove, Oklahoma, on January 12 and 13 and discussed the proposed vending machine business with Roberts and petitioner King, who owned the nearby Show Boat Club (Tr. 24, 44-45). Petitioner King noted that his club had also been raided, that his furniture had been seized, and that he had stolen the furniture back (Tr. 47). Through the help of petitioner Duardi, the charges had been reduced or dropped, for which King had given him a partnership in the Show Boat (Tr. 47-48).

On January 13, 1972, Roberts and petitioners Bishop and King drove to Kansas City where Roberts and Bishop entered into a partnership agreement giving Bishop an interest in the Mr. Yuk Club (Tr. 50-51, 452). During the return trip, the three thoroughly discussed the raids on the Mr. Yuk Club. Petitioner King stated that he had a prior arrangement with petitioners Grayson and Husong, a special investigator for Grayson, by which poker games were allowed in the Show Boat Club. King suggested that Husong should be contacted to relieve the legal pressure on the Mr. Yuk Club (Tr. 55).

The next day Roberts met with Husong, who indicated that the raids could be stopped and that gambling could be arranged (Tr. 59-60). Husong told Roberts that in return he and Grayson would need 20 percent of the gambling proceeds to keep other law enforcement officers away (Tr. 60, 62). A day later Husong told Roberts that a new car would also be needed for the local sheriff (Tr. 61). Roberts said that an additional room would have to be built for the gambling, that a motel and an amusement park were being considered, and that there would also be gambling at the Show Boat. Roberts then offered petitioner Husong 5 percent of the entire operations, rather than 20 percent of the gambling proceeds (Tr. 63).

On January 16, Roberts met with Bishop, Brancato, and Duardi and discussed the proposed agreement to be reached with Husong and Grayson (Tr. 67). Brancato suggested that a car be leased rather than purchased, so that it could be returned to the lessor if the law enforcement officers failed to honor their agreements (*ibid.*). In discussing the operation of the project, Duardi suggested that girls be employed to entertain and be companions for the customers (Tr. 69-70).

At Duardi's suggestion, Roberts met with Grayson and Husong the next day (Tr. 71). Grayson advised Roberts that anything said by Husong could be believed (Tr. 72). During the following two weeks, Roberts and petitioners Bishop, Brancato, Duardi,

and Husong met several times to discuss protection from raids, financing, and building of the expansion to the Mr. Yuk Club (Tr. 91-109). Mrs. Olivia Pitts, an unindicted co-conspirator, agreed during this period to obtain a loan through the Small Business Administration or Bureau of Indian Affairs to finance the proposed venture (Tr. 109).

On February 3, 1972, petitioner Bishop informed Roberts that he was leasing a car for the local sheriff (Tr. 111). The next day Bishop and Roberts delivered a 1972 Chevrolet Impala to petitioner Grayson (Tr. 112). Grayson decided to keep the car until after an upcoming election, to determine if the sheriff would be reelected (Tr. 114). Petitioner Husong agreed in return to give prior notification of any raids on the Mr. Yuk Club (Tr. 115).

Husong advised Roberts on February 25 that Treasury or Internal Revenue agents had told Grayson that they were coming to the area, and that there would be no further meetings until they left (Tr. 139). It appeared at this time that financing for the proposed venture would be unavailable (Tr. 140-141). On February 27, Husong advised Roberts that he and petitioner Grayson would honor the prior agreements on notification of raids and tolerance of gambling, that they would keep the car and make the payments on the lease, and that they would expect no percentage from the gambling (Tr. 143). After Internal Revenue agents arrived in Grove, petitioners King, Bishop, and Duardi decided to defer any further activity (Tr. 149, 151).

ARGUMENT

1. Petitioners urge that they were prejudiced by the delivery to the jury of an exhibit that was not admitted into evidence. Prior to trial, the parties stipulated in Stipulation Exhibit E that certain telephone records could be admitted into evidence, subject only to objections for relevancy or materiality. The stipulation was admitted as Court's Exhibit 1, but the attached copies of the telephone records were not admitted (Tr. 36a, 60a, 901). At trial, the government offered Exhibit R, entitled "Key to Review of Telephone Toll Records" (Pet. App. 3; Tr. 658), which listed the location of certain telephones, most of which were in the residences or businesses of petitioners or their co-conspirators (Pet. App. 3, pp. 47-50). It then listed numerous calls to and from those telephones during the period of the conspiracy (Pet. App. 3, pp. 51-66). The trial court sustained petitioners' objections to the exhibit because it contained irrelevant pay phone calls (Tr. 659).[3] The trial judge, in order to avoid the difficulties that might arise through the inadvertent transmittal of documents offered but not received in evidence, instructed the clerk to review the exhibits (Tr. 900-903). The one-foot high stack of exhibits (Tr. 901) was then

[3] Apparently, Exhibit R was discussed in chambers during the trial (Tr. 658). The prosecutor was advised that the exhibit would be admitted if certain calls between public pay telephones, in which the caller was not identified, were deleted (Pet. App. 1, p. 30). Those calls had not been deleted when the exhibit was offered in court (Tr. 658).

sent to the jury. When they were collected after the trial, Exhibit R was found with the properly admitted exhibits (Pet. App. 1, p. 29). The trial judge advised the parties that Exhibit R had apparently gone to the jury room with the other exhibits (*ibid.*).

Assuming that Exhibit R did go to the jury room, there was error. *Osborne* v. *United States*, 351 F. 2d 111, 115 (C.A. 8). But, as the district court found in considering petitioners' new trial motions, petitioners were not prejudiced (Pet. App. 1, pp. 33-35).

Petitioners magnify the significance of Exhibit R. They urge that it was the only corroboration of Roberts' testimony that certain telephone calls occurred. Roberts, the government's main witness, testified about many telephone conversations that occurred during the course of the conspiracy (Tr. 30, 42, 63-64, 71, 98, 100, 111, 121, 137, 146-147, 152, 299). The parties were identified and those calls were plainly relevant. Indeed, it is precisely those calls that would have been properly admitted in Exhibit R except that the exhibit also included some non-probative calls from pay telephones.[4] In any event, Exhibit R did not significantly corroborate the essential incriminating points of Roberts' testimony. Petitioners' defense was not that they did not deal with Roberts, but that they did not engage in an illegal enterprise with him. Since they admitted to dealing with Roberts, evidence

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[4] The jury could not have been misled as to those calls which involved pay telephones. The exhibit identifies each pay telephone involved and does not purport to identify the parties to any call.

of communications among petitioners and Roberts could not have prejudiced their defense or significantly influenced the jury's verdict.

Petitioners also note that one of the listed calls tends to impeach their only witness, Mrs. Pitts (Pet. 19-20). She testified that she first met petitioner Bishop on January 24, 1972 (Tr. 728-729). But Exhibit R shows a call from Mrs. Pitts' residence to petitioner Bishop's residence on January 19, 1972 (Pet. App. 3, p. 53), and therefore impeaches her testimony. However, the telephone record of that call was thoroughly used during cross-examination to impeach Mrs. Pitts' testimony (Tr. 734-735), and the jury could not have been further influenced by the inclusion of that call in Exhibit R.

The evidence against petitioners was overwhelming. Roberts' testimony was corroborated, in varying degrees, by sixteen other government witnesses and by substantial documentary evidence. Exhibit R was neither highly prejudicial nor inflammatory.[5] We submit that a reading of the record and consideration of the form and content of Exhibit R (Pet. App. 3) shows that the erroneous transmittal of that document could have had no significant impact on the minds of the average jury. See *Harrington* v. *Cali-*

[5] This case is therefore unlike *Osborne* v. *United States*, *supra*, 351 F.2d 111 (C.A. 8), where the court reversed when a "highly damaging and prejudicial" grand jury transcript was inadvertently delivered to the jury. 351 F.2d at 117.

fornia, 395 U.S. 250, 254. Petitioners' claim of prejudice is therefore without merit.[6]

2. Petitioners claim that allegedly prejudicial remarks and testimony denied them a fair trial (Pet. 21-22).

a. Overt act 22 of the indictment charged that petitioners Bishop and King attempted to kill Jess Roberts on March 16, 1972, "in order to carry on the establishment of the proposed gambling, prostitution and bribery activities without interference and to consolidate their control over those activities and the profits to be derived therefrom * * *" (P. Tr. 8). That part of the indictment was read to the jury panel during *voir dire*, and was referred to during the prosecutor's opening statement (P. Tr. 8; Tr. 45a, 50a-56a). Petitioners did not object to the references to the shooting. One witness testified that she remembered the last time petitioner Bishop was at her motel because that was the day Roberts was shot (Tr. 102a, 113a). Petitioners did not object or move to strike the testimony. On the next day, the court expressed doubts as to the admissibility of evidence of the shooting which, although charged as an overt act, would be prejudicial (Tr. 128-129). The prosecutor subsequently agreed not to introduce evidence re-

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[6] Petitioner urges that the opinion below is in conflict with *United States* v. *Adams*, 385 F.2d 548 (C.A. 2). In *Adams*, reversal was required where "a neat condensation of the government's whole case against the defendant" was sent to the jury, although not admitted into evidence. 385 F. 2d at 550. Exhibit R was by no means a summary of the government's case against petitioners. *Adams* thus does not conflict with the holding below.

lating to overt act 22 (Tr. 160). Thereafter, in response to a question on cross-examination, Roberts testified that he did not remember exactly what he told federal agents on March 23, 1972 because he was in the hospital under heavy sedation at that time (Tr. 313).

Petitioners' contention that these references were improper is without merit. Evidence of the shooting, although showing a crime not charged in the indictment, should have been admitted because the elimination of Roberts would have enabled petitioners to maintain more complete control over the proposed enterprise; it was thus an act in furtherance of the conspiracy. Moreover, the shooting showed intent and was thus admissible. *United States* v. *Cochran*, 475 F.2d 1080, 1082-1083 (C.A. 8), certiorari denied, 414 U.S. 833; *United States* v. *Parker*, 469 F.2d 884, 889-890 (C.A. 10).

In any event, petitioners were not harmed. The jury was instructed that there was no evidence of a shooting in the case, and that the reference to it in the government's opening statement was to be ignored (Tr. 856).

b. The government's evidence showed that petitioner Grayson used the leased car as security in obtaining a $2,000 loan (Tr. 650-652). Petitioners urge that this showing of this offense not charged in the indictment was improperly prejudicial. Petitioners were charged with conspiracy to bribe. Petitioner Grayson's use of the car as collateral indicates that he had received and accepted the car, which was the

bribe. The evidence was therefore properly admitted to show that an object of the conspiracy had been achieved.

c. Petitioners also assert that the prosecutors engaged in improper final argument by allegedly commenting on petitioners' failure to testify. After relating the testimony of Mrs. Pitts, the sole defense witness, the prosecutor stated (Tr. 791-792):

> Then you might contrast the evidence that the government has presented to you in corroboration of the events as we see them, as opposed to the evidence that the defense was able to present to you through cross-examination and through Mrs. Pitts, on the other side of the story.

That comment related only to the evidence presented by petitioners, not to their failure to testify, and was therefore proper.

Petitioner Bishop's attorney noted during closing argument that Mr. DeFeo, one of the government counsel, spoke only once during the entire case: to cross-examine Mrs. Pitts (Tr. 839). In rebuttal argument, DeFeo responded (Tr. 845-846):

> * * * as one of the defense counsel pointed out, I certainly have not taken a very active part in the trial of this case. However, under the division of responsibility between myself and Mr. Cornwell, it is his responsibility to handle the examination of the government witnesses and my responsibility to handle cross-examination of defense witnesses. As you saw, there was very little in the way of a defense, and consequently I had very little to do. However, I am happy to

> have the opportunity to handle this part of the argument, because it is a stage that is very important in the trial.

The statement was thus not a comment on petitioners' failure to testify, but rather an explanation of DeFeo's participation during the trial, a matter initially raised by the defense.

d. Lastly, petitioners urge that the prosecutor improperly argued that every witness who could discredit the government's main witness had testified. The prosecutor's full statement was as follows (Tr. 850):

> Mr. Williams [petitioner King's attorney] also touched upon the fact that Mr. Roberts had talked to government investigators and attorneys for eight days—or on eight days, he said about one day a month for eight months, something like that, and then that sort of ties into what Mr. Pierce said, "Would you be willing to have your fate decided upon the testimony in this case."
>
> Well, ladies and gentlemen, that ties into the government talking with Mr. Roberts for eight days, that ties in with the masses of documentary evidence here. The picture we want to present to you people, the evidence we want to present to you people, is that every logical avenue of investigation has been explored, that Roberts' testimony has been fully gone through, and every witness who was available to either corroborate or discredit him has been put before you.
>
> His employees, his records of his travel, you have all of that before you, and we think that based upon all that evidence you can be very certain in your own minds that his testimony is

> amply corroborated, that these defendants did what they are accused of doing, and that you could render a verdict of conviction without any reasonable doubt.

The argument was in response to petitioners' repeated attacks on Roberts' credibility and did not relate to petitioners' failure to testify. Had it been intended as a reference to petitioners, the import of the challenged statement would have been that petitioners could neither corroborate nor discredit Roberts' testimony. But in light of Roberts' testimony about petitioners' activities, the government would not have made such an argument. It follows that the statement could not have been intended or construed as a comment on petitioners' failure to testify.[7]

3. Petitioners urge that the evidence is insufficient to show that prostitution was an objective of the conspiracy (Pet. 22-24). They were charged with conspiracy to establish a business involving gambling, bribery and prostitution. It is well settled that where the indictment conjunctively alleges several ways in which an illegal act may occur, as petitioners' indict-

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[7] Petitioners also urge that three improper references were made regarding unnamed persons who may have been involved in the conspiracy (Pet. 22). However, the indictment charged the conspiracy among petitioners, Roberts, Mrs. Pitts, and "other persons whose identities are to the Grand Jury unknown" (Tr. 862-863). In any event, the references were isolated (Tr. 122, 469, 494-495). The first remark was stricken (Tr. 130) and there was no objection to the second (Tr. 469). Whether these statements were improper or not, petitioners could not possibly have been harmed.

ment does, the conviction stands if the evidence is sufficient with respect to any of the acts charged. See, *e.g.*, *Turner* v. *United States*, 396 U.S. 398, 420; *Crain* v. *United States*, 162 U.S. 625, 636; *United States* v. *Goodwin*, 455 F.2d 710, 714 (C.A. 10), certiorari denied, 409 U.S. 859; *Joyce* v. *United States*, 454 F.2d 971, 976-977 (C.A.D.C.), certiorari denied, 405 U.S. 969. Petitioners do not challenge the sufficiency of the evidence relating to the gambling and bribery aspects of the conspiracy. Accordingly, even if the evidence does not sufficiently show that prostitution was contemplated, petitioners' claim is without merit.

In any event, the evidence showed that petitioners planned to hire women who would "double as waitresses" and act as companions for the customers who would be getting away from their wives and businesses (Tr. 69-70). The women would accompany the customers to their rooms, at the customers' expense (Tr. 96). The jury could thus infer, because payment for the "companionship" was involved, that prostitution was contemplated.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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